LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 18 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1037

GRAZIANO J. MANCUSO,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

NORMAN P. RAMSEY,
10 Light Street,
Baltimore, Maryland, 21202,

THOMAS WAXTER, JR.,
10 Light Street,
Baltimore, Maryland, 21202,

H. THOMAS HOWELL,
10 Light Street,
Baltimore, Maryland, 21202,
Attorneys for Petitioner.

The Daily Record Co., Baltimore, Md. 21203

INDEX

Table of Contents

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Rules of Court	2
Statement	2
1. The Right-to-Warning Question	3
2. The Invasion of Files Question	5
Reasons for Granting the Writ	8
1. The Right-to-Warning Question	8
2. The Invason of Files Question	16
Conclusion	24
Appendix A—Opinions Below	25
Appendix B—Judgment and Orders Below	39
Appendix C—Oral Opinion of the District Court	43
Appendix D—Constitutional Provisions and Rules of Court	55

Authorities

Cases

Black v. United States, 385 U.S. 26	21
Burgett v. Texas, 88 S. Ct. 258 (No. 53, this Term)	22
Caldwell v. United States, 205 F. 2d 879 (D.C. Cir. 1953), cert. denied 349 U.S. 930	18, 22, 23

PAGE

Coplon v. United States, 191 F. 2d 749 (D.C. Cir. 1951) cert. denied 342 U.S. 926 23
Dusky v. United States, 362 U.S. 402 15
Elkins v. United States, 364 U.S. 206 ..... 12, 23
Escobedo v. Illinois, 378 U.S. 478 ..... 4, 8, 12-13, 14
Glasser v. United States, 315 U.S. 60 22
Gouled v. United States, 255 U.S. 298 15
Groban, In re, 352 U.S. 330 14
Hamilton v. Alabama, 368 U.S. 52 10
Hickman v. Taylor, 329 U.S. 495 ..... 17, 18-19, 20
Hoffa v. United States, 385 U.S. 293 ..... 7, 20
Holland v. United States, 348 U.S. 121 19
Johnson v. United States, 333 U.S. 10 15
Johnson v. Zerbst, 304 U.S. 458 ..... 14, 15
McNabb v. United States, 318 U.S. 332 12
Massiah v. United States, 377 U.S. 201 ..... 14, 20
Mathis v. United States, 376 F. 2d 595 (5th Cir. 1967) cert. granted, 88 S. Ct. 224 (No. 726, this Term) 15-16, 24
Nash v. Illinois, 88 S. Ct. 222 (No. 163, Misc., this Term) 22
O'Brien v. United States, 386 U.S. 345 21
Powell v. Alabama, 287 U.S. 45 11
Reisman v. Caplin, 375 U.S. 440 14
Roberts v. United States, 88 S. Ct. 1 (No. 330, this Term) 21
Silverthorne Lumber Co. v. United States, 251 U.S. 385 23-24
Simon v. Wharton, cert. granted 386 U.S. 1030, vacated as moot, 36 U.S.L.W. 3252 (12/18/67) (No. 72, this Term) 19
Singer v. United States, 380 U.S. 24 17
Smith v. United States, 250 F. Supp. 803 (D. N.J. 1966) 12

PAGE

Terkeltoub, In re, 256 F. Supp. 683 (S.D. N.Y. 1966) 17, 18
Thomas v. United States, 386 U.S. 975 14
United States v. Blalock, 255 F. Supp. 268 (E.D. Pa. 1966) 15
United States v. Blue, 384 U.S. 251 ..... 7, 20, 23
United States v. First National Bank of Pikeville, 274 F. Supp. 283 (E.D. Ky. 1967) 12
United States v. Gower, 271 F. Supp. 655 (M.D. Pa. 1967) 11, 13
United States v. Judson, 322 F. 2d 460 (9th Cir. 1963) 17
United States v. Kleckner, 273 F. Supp. 251, app. dis. 382 F. 2d 1022 (6th Cir. 1967) 11
United States v. Kovel, 296 F. 2d 918 (2d Cir. 1961) 17
United States v. Lebron, 222 F. 2d 531 (2d Cir. 1953) cert. denied 350 U.S. 876 23
United States v. Maius, 378 F. 2d 716 (6th Cir. 1967) cert. denied 88 S. Ct. 216 (10/16/67) (No. 372, this Term) 13
United States v. Schoenburg, 19 AFTR 2d 347 (D. Ariz. 1966) 13
United States v. Simon, 262 F. Supp. 64 (S.D. N.Y. 1966) reversed 373 F. 2d 649 (2d Cir. 1067) cert. granted *sub. nom. Simon v. Wharton*, 386 U.S. 1030, vacated as moot, 36 U.S.L.W. 3252 (12/18/-67) (No. 72, this Term) 19, 20, 23
United States v. Turzynski, 268 F. Supp. 847 (N.D. Ill. 1967) 10, 11, 13, 14-15
United States v. Venuto, 182 F. 2d 519 (3rd Cir. 1950) 23
Watts v. Indiana, 338 U.S. 49 14
White v. Maryland, 373 U.S. 59 14

Constitutional Provisions

PAGE

Sixth Amendment to the United States Constitution 2, 7, 13-15, 18-24, 55

Statutes

26 U.S. Code §7201 ..... 2, 55
26 U.S. Code §7608(b) 10, 55-56

Rules of Court

Rule 16(c), Federal Rules of Criminal Procedure .. 17-18, 56-57
Rule 41(e), Federal Rules of Criminal Procedure .. 23, 57

Regulation

Organization of the IRS (1118.6 *Intelligence Division*), 30 Fed. Reg. 9368 (7/28/65) 10, 57

Miscellaneous

Burnes, *Searches & Seizures*, N.Y.U. 20th INST. ON FED. TAX. 1081 (1962) 9
Duke, *Prosecution for Attempts to Evade Tax: A Discordant View of a Procedural Hybrid*, 76 YALE L.J. 1 (1966) 11, 13
Hewitt, *The Constitutional Rights of a Taxpayer in a Fraud Investigation*, 44 TAXES 660 (1966) 11, 13
Krohnke, *The Constitutional Right to Counsel in Tax Investigations*, 33 U. CHI. L. REV. 134 (1965) 11, 13
Lipton, *Constitutional Rights in Criminal Tax Investigations*, 53 A.B.A.J. 517 (1967) 11, 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. ------

GRAZIANO J. MANCUSO,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Graziano J. Mancuso, Petitioner, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fourth Circuit (en banc), entered in this case on December 8, 1967.

OPINIONS BELOW

The oral opinion of the District Court (App. C, *infra*, pp. 43-54) is unreported. The original opinion of a three-judge panel of the Court of Appeals (App. A, *infra*, pp. 25-36) is reported at 378 F. 2d 612. On rehearing en banc, the Court of Appeals rendered an addendum opinion (App. A, *infra*, pp. 37-38) which has not yet been reported.

JURISDICTION

The Court below entered judgment on December 8, 1967, after rehearing en banc (App. B, *infra*, p 41). On Decem-

ber 18, 1967, the Court below stayed its mandate pending timely application to this Court for a writ of certiorari (App. B, *infra*, p. 42). On January 3, 1968, Mr. Justice Brennan extended the time for filing the transcript of the record in this case to and including February 6, 1968. The jurisdiction of this Court is invoked under 28 U.S. Code §1254(1).

QUESTIONS PRESENTED

1. Is a taxpayer interviewed by a Special Agent of the IRS, who is gathering evidence for intended use in a criminal tax prosecution, entitled by the Sixth Amendment to warning that he is the subject of a criminal investigation and of his right to counsel before evidence obtained from him can be used to convict him of charges resulting from such investigation?

2. Is it contrary to the Sixth Amendment and to the fair administration of justice for a federal prosecutor, who has wrongfully obtained and examined the private files and work product of defense counsel, to prosecute the case to conviction forearmed with advance personal knowledge of the entire defense case?

CONSTITUTIONAL PROVISION, STATUTES, RULES OF COURT, AND REGULATIONS INVOLVED

All constitutional provisions, statutes, rules of court, and regulations involved are set forth in App. D, *infra*, pp. 55-57.

STATEMENT

Petitioner was convicted in the District Court for the District of Maryland on each of five counts of an indictment charging willful evasion of income tax for the years 1956-1960. (26 U.S. Code §7201.)

1. *The right-to-warning question.* On December 15, 1960, Revenue Agent Levitas determined that a potential tax fraud case existed against Petitioner, a partner of a family business in Baltimore. He referred the file to Special Agent Gordon, whose "primary function was the investigation of a taxpayer's affairs in order to determine whether or not criminal prosecution should be recommended."[1] On December 19, Gordon concluded that criminal fraud was involved. On May 31, 1961, after six months' investigation, Gordon by letter directed Petitioner to appear "with whatever financial records you possess". On June 9, without having consulted a lawyer and without one present, Petitioner met with Gordon and Levitas in an IRS conference room for what he assumed would be a routine audit. Also present was the accountant who had prepared his returns. In this, his very first encounter with IRS agents, Petitioner was not told that a criminal investigation was in progress; that he was suspected of fraud; that Gordon had already decided to work up a net worth prosecution against him. Nor was he advised of his right to counsel. Gordon obtained admissions as to starting point net worth by posing a long series of questions, many of which Petitioner did not understand or know how to answer. Gordon demanded and received all of Petitioner's personal and partnership records, which he retained for nearly a year.

Petitioner heard nothing further for six months. Unknown to him, Gordon intensified his investigation, secured affidavits, and subpoenaed bank records. On December 14, he met again with Petitioner and interrogated him at length without mentioning the right to counsel or the real purpose of his inquiry. On February 2, 1962, Gordon notified Petitioner *for the first time* that he was being recommended

---

[1] This fact was conceded on rehearing en banc. Appellee's Supplemental Brief on Rehearing en Banc, p. 19. Gordon's own testimony was to the same effect.

for prosecution and was entitled to legal representation. Only then (and in immediate response to this notice) did Petitioner retain counsel, who filed a power of attorney, secured return of his books and records, and brought the interviews to a halt.

Petitioner was indicted in 1963, and moved to suppress all oral statements and documents given to Gordon, invoking the Sixth Amendment. The foregoing facts were presented at a pre-trial hearing before District Judge Northrop, who denied the motion on the ground that Petitioner had not requested a lawyer and that *Escobedo v. Illinois*, 378 U.S. 478, applied "only where a request has been made and that request has been denied" (App. C, *infra*, p. 46).

At trial (January 24-February 11, 1966), Gordon was permitted to testify as to purported oral admissions and documents obtained from Petitioner during the two 1961 interviews. Petitioner had to take the witness stand to dispute the truth and accuracy of Gordon's versions. The Court's charge included instructions that the jury could consider his extrajudicial utterances and weigh any "false exculpatory statements" as bearing "on the question of intent to evade income taxes". After conviction, motion was filed in the alternative for acquittal or new trial, which was denied without opinion on July 29, 1966. Petitioner duly appealed.

In an opinion of May 19, 1967, a three-judge panel of the Court of Appeals held that *Escobedo* "principles may apply in federal tax cases" but not "to a tax audit, i.e., an investigation by revenue agents of a taxpayer's tax returns and records for the purpose of determining whether or not additional taxes are due and whether or not a crime has in fact been committed." (App. A, *infra*, pp. 35-36). The opinion further recited that, as to the two 1961 interviews,

"the defendant *was accompanied by an attorney* and his accountant" and "attended the meetings under no compulsion save his own *or counsel's judgment* that it was in his best interest to do so." Then it concluded:

> "If it be assumed that defendant *and his lawyer* were unaware of his legal right to resist the investigation, the result is the same. That defendant subjectively may not have known of his rights does not vitiate his voluntarly disclosures *made with advice of counsel.*" (App. A, *infra*, pp. 35, 36). (all italics added).

In a timely Petition for Rehearing en Banc, Petitioner invited the Court's attention to the undisputed fact that at *neither* interview was he represented or accompanied by counsel, acting with advice of counsel, or afforded legal assistance of any description. He also excepted to characterization of the criminal investigation as a mere "tax audit". The Court granted rehearing en banc (App. B, *infra*, p. 40). The supplemental briefs on both sides pointed up the clearly erroneous factual premises on which the opinion rested, but the Court en banc adopted the original opinion and affirmed without mention of this issue (App. A, *infra*, p. 38).

2. *The invasion of files question.* On September 7, 1965, two years after indictment and three weeks before the scheduled trial, an Assistant U.S. Attorney (Ronald T. Osborn) phoned Counsel and sought in vain the production of certain papers to wit: the defense net worth statements and supporting schedules prepared for Counsel's use at trial by Milton Duke, an accountant retained to assist the defense. Duke attended many attorney-client conferences and had access to the entire defense file, including confidential letters, legal memoranda, trial notes, Petitioner's private papers, and the net worth statement. Up to that time Duke's fidelity to the defense was unquestioned.

Despite knowledge of Duke's role, Osborn immediately got from Duke what he had failed to obtain from Counsel. That same morning (September 7) Osborn talked to Duke and directed him to produce the defense file. He did not notify Counsel or the Court. Osborn wanted the defense net worth schedules to supplement the Government's case and to gain insight into defense planning and strategy. Duke returned in an hour or so with the file, as well as photocopies prepared for Osborn's use. Gordon and Levitas examined the entire file and made notes (later destroyed) while Osborn subjected Duke to a lengthy interview covering his work for the defense. Osborn then personally inspected the file and had more copies made for his own use. All schedules prepared for Counsel were copied, annotated, and compared. From his review of defense material, Osborn was able to uncover Counsel's strategy, determine how Counsel proposed to meet the prosecution and exploit its weaknesses, and check the defense net worth statement against his own for discrepancies. Gordon interviewed two new witnesses whose names appeared on Counsel's papers. The Government net worth statement (used at trial) was revised a few days later.

When Counsel learned of the episode, he immediately protested in person and by letter. Ignoring these protests, Osborn called in Duke for two additional sessions and explored his dealings with Petitioner. Counsel was not notified and the secrecy of the later meetings was not broken until a pre-trial hearing before Judge Northrop on September 30. On the foregoing facts, based exclusively on the testimony of Osborn and Gordon, the Court found that Counsel's work product had been wrongfully appropriated and ordered suppression of pages copied by the Government, ordered Osborn to produce his own net worth statement, instructed him to have no further contact with Duke, and permitted Counsel time to retain another ac-

countant. However, the Court denied a motion to dismiss, finding "no reasonable likelihood of actual prejudice if the trial is allowed to go forth" (App. C, *infra*, pp. 47-48).

At trial Osborn prosecuted and called Gordon and Levitas as his main witnesses. Duke also testified against Petitioner (whose defense he had helped prepare). Government net worth statements were admitted over strenuous objection. On cross-examination of the new defense accountant (Paul Wist), the prosecution brought out that Wist had nothing to do with preparing the defense net worth statement, belittled his efforts to prepare for trial, commented upon his late arrival in the case, and flatly accused him of making false and unwarranted assumptions. After conviction Petitioner moved in the alternative for acquittal or new trial, setting forth grounds of actual prejudice. The motion was denied without opinion on July 29, 1966.

On appeal (App. A, *infra*, pp. 34-35), and again on rehearing en banc (App. A, *infra*, p. 38), the Court of Appeals held on the strength of *United States v. Blue*, 384 U.S. 251, and *Hoffa v. United States*, 385 U.S. 293, that the District Court's remedial action cured any "substantial prejudice" to Petitioner's rights under the Fourth, Fifth, and Sixth Amendments. The opinion en banc concluded as follows:

> "In argument, the government expressly disclaimed wrongful intent in what it did, and candidly admitted an extreme, even stupid, error of judgment. The government's deficiencies in the proper conduct of this prosecution were not erased by notice to counsel of what was done. Nevertheless, we are persuaded that in this case wrongful intent was absent. Except for such absence and the lack of substantial prejudice we would dismiss the prosecution and discharge the defendant under our supervisory power over the district courts of this circuit." (App. A, *infra*, p. 38).

It was Osborn (retained as a Special Assistant U.S. Attorney) who argued the case on rehearing and "persuaded" the Court that "wrongful intent was absent".

REASONS FOR GRANTING THE WRIT

I.

The-Right-To-Warning Question

1. *The decision below is tantamount to refusal to hear and determine the case on the merits.* The Court below correctly assumed that *Escobedo v. Illinois,* 378 U.S. 478, "may apply in federal tax cases" but denied Petitioner impartial review of this question because of a patently erroneous conception of undisputed facts. For reasons unknown, the Court surmised that Petitioner "was accompanied by an attorney" and acting on "advice of counsel" during the two 1961 IRS interviews. This is not even arguably true and is flatly contradicted by the record. Obviously, if he actually had counsel in 1961, no question would ever have arisen in the first place or been pressed in the court below (much less in this Court). We submit that the Court below created a straw man — a phantom lawyer — whom it criticizes for neglecting his client's rights. Despite Petitioner's briefs on rehearing, it has refused to give the straw man a decent burial and to adjudicate on the merits. Under the circumstances, it would be appropriate for this Court to summarily vacate the judgment below and remand the case for reconsideration in the light of the actual record.

2. *The deceptive practice sanctioned below is offensive to the fair administration of justice in federal courts.* In this era of expanding constitutional protection, the taxpayer still enters the field of battle with stone ax and wooden spear. Worse, he is blindfolded by Special Agents

and exposed to every weapon in the IRS arsenal before he even has a chance to find his ax and spear. If the taxpayer is ever to achieve equality of protection when he is caught up in the criminal process, he must be warned where he stands and protected from the hoax that his prosecution-minded interrogators are merely conducting a civil audit. The issues here presented are of paramount importance to the taxpaying public and can only be resolved by this Court, since the federal judiciary seems unable even to identify the problem, or come to grips with it.

The decision below is a representative holding that the Bill of Rights does not apply "to a tax audit, i.e., an investigation by revenue agents of a taxpayer's tax returns and records for the purpose of determining whether or not additional taxes are due and whether or not a crime has in fact been committed" (App. A, *infra*, p. 36). Yet nothing in the record or in the District Court's findings remotely suggests that Special Agent Gordon was a "revenue agent" conducting a "tax audit" for the pristine purpose of finding tax deficiencies. (One might as easily say that an FBI agent is checking irregularities in the Federal Reserve system when he interrogates a suspected bank robber.)

> "The sole function of a Special Agent in the Intelligence Division of the Internal Revenue Service is to seek evidence of crimes. He has no concern whatsoever with the amount or collection of any additional tax, these being strictly the concern of the Revenue Agent. He is exactly the same as any other Treasury Agent who may seek evidence of narcotics, counterfeiting, alcohol tax, customs violations, etc. A Special Agent is a criminal law enforcement officer, just as any state or municipal detective or policeman." Burnes, *Searches and Seizures*, N.Y.U. 20TH INST. ON FED. TAX. 1081, 1087 (1962).

A Special Agent has sweeping powers of arrest, search, and seizure in enforcing income tax laws. See 26 U.S. Code Sec. 7608(b). Far more significant, departmental regulations (App. D, *infra*, p. 57) not only assign him *exclusively* to criminal investigations, but vest in him unreviewable discretion in recommending prosecution and make him a virtual adjunct to the U. S. Attorney.

Only after a Revenue Agent performs an audit and detects fraud does a Special Agent enter the case.

> "It is at this point, when the case is turned over to the Intelligence Division, that the investigation admittedly has as its ultimate objective the conviction of the taxpayer for criminal tax evasion. He is now a suspect who, although he is unaware of it, is being asked to furnish the investigative agents with information which he has a constitutional right to refuse to furnish and with respect to which he is entitled to have the advice of counsel. He is being asked to convict himself without knowing it." *United States v. Turzynski*, 268 F. Supp. 847, 854 (N.D. Ill. 1967).

Being concerned only with known fraud cases, the Special Agent is not seeking to determine whether fraud exists but whether it warrants prosecution. His interviews are to acquire proof of willfulness without disclosing his true purpose.

As matters now stand, a taxpayer is possibly the only criminal suspect kept unaware of imminent prosecution until he has furnished the agent with all evidence necessary to convict. The decision to prosecute hinges upon what he says or what documents he surrenders at the first interview. This is a critical stage when valuable constitutional and legal rights "may be irretrievably lost, if not then and there asserted," *Hamilton v. Alabama*, 368 U.S. 52, 54. Without legal advice a taxpayer cannot assert

his rights, even if abstractly aware of them, because every effort is made to conceal from him the central fact that he is involved in the advanced stages of a criminal proceeding. The Special Agent secretly builds his case for prosecution while nurturing the taxpayer's belief that the matter is still a routine audit which can be resolved by cooperation and compromise. Kept ignorant of his peril, and under an apparent duty to explain everything, it does not occur to the taxpayer that "he requires the guiding hand of counsel at every step in the proceedings against him." *Powell v. Alabama,* 287 U.S. 45, 69. In such a setting, devoid of safeguards, he is relieved of his papers and coaxed into responses made on hasty reflection and with incomplete grasp of the facts — responses later construed (or misconstrued) as admissions and falsehoods. Only after the Special Agent extracts evidence he deems sufficient to convict is the taxpayer notified that the investigation is now complete and advised of his right to counsel.

The "audit hoax" has been denounced as a calculated trap for the unwary, its main victims being average citizens who (like Petitioner) are experiencing their first and probably last contact with the criminal process. Lipton, *Constitutional Rights in Criminal Tax Investigations,* 53 A.B.A.J. 517 (1967); Duke, *Prosecution for Attempts to Evade Tax: A Discordant View of a Procedural Hybrid,* 76 YALE L.J. 1 (1966); Hewitt, *The Constitutional Rights of the Taxpayer in a Fraud Investigation,* 44 TAXES 660 (1966); Krohnke, *The Constitutional Right to Counsel in Tax Investigations,* 33 U. CHI. L. REV. 134 (1965). With but a few recent exceptions, *United States v. Turzynski, supra; United States v. Kleckner,* 273 F. Supp. 251 (S.D. Ohio), app. dis. 382 F. 2d 1022 (6th Cir. 1967); *United States v. Gower,* 271 F. Supp. 655 (M.D. Pa. 1967), the federal courts seem impervious to the cold reality that a "tax audit"

is transformed into a criminal proceeding at the precise moment that a Special Agent enters the case. A three-judge court recently went so far as to attach controlling significance to the following:

> "* * *, the special agent conducting the investigation, testified on discovery that the purpose of the investigation was to 'determine the accuracy of the income tax returns of the taxpayers.'" *United States v. First National Bank of Pikeville*, 274 F. Supp. 283, 284 (E.D. Ky. 1967).

And in *Smith v. United States*, 250 F. Supp. 803, 806 (D.N.J. 1966), a Special Agent's activities were thus described:

> "The proceeding complained of was a fact-finding, non-adjudicative investigation by an administrative agency. * * * There was no criminal prosecution here, no accused, not even a hearing, only an investigatory, fact-finding proceeding."

It is submitted that since the federal courts suffer from the widespread delusion that an interview with a Special Agent is a rather innocuous matter, it is grossly unfair for such courts to penalize and impute waivers to an unsophisticated taxpayer who is duped by the "audit hoax". Our federal system of criminal justice does not thrive on intrigue and tactics designed to induce ignorant surrender of fundamental rights. Such tactics are an affront to human dignity and, because the taxpayer is acting without grasp of the material facts, pose an inherent threat to the reliability of the guilt-finding process. That federal prosecutions and convictions should depend on evidence so acquired is ample reason why this Court, in its supervisory capacity, should review the ignoble origins. *McNabb v. United States*, 318 U.S. 332; *Elkins v. United States*, 364 U.S. 206. To give the taxpayer knowledge of the truth is to give him no more than the very thing our legal system is striving for. As this Court had occasion to say in *Escobedo v. Illinois*, 378 U.S. 478, 490:

> "We have learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizen's abdication through unawareness of their constitutional rights. No system worth preserving should have to *fear* that if an accused is permitted to consult a lawyer, he will become aware of, and exercise these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system."

3. *The decision below involves important constitutional questions which have not been, but should be, settled by this Court.* The decision below holds, in effect, that a taxpayer is entitled to no constitutional protection in his dealings with Special Agents if he fails to assert his rights through ignorance. Other circuits have achieved the same result by various lines of reasoning. Although the Sixth Circuit recently articulated serious misgivings on the subject, it declined to act until "told by superior authority that a citizen's constitutional rights are imperiled by such procedure * * *." *United States v. Maius*, 378 F. 2d 716, 719 (6th Cir. 1967), cert. denied 88 S. Ct. 216 (10/16/67) (No. 372, this Term). With one exception, discussed *infra*, this Court has denied certiorari in every such case to come before it. To date, however, three courts have upheld the taxpayer's position. *United States v. Gower*, 271 F. Supp. 655 (M.D. Pa. 1967); *United States v. Turzynski*, 268 F. Supp. 847 (N.D. Ill. 1967); *United States v. Schoenburg*, 19 AFTR 2d 347 (D. Ariz. 1966). Such decisions derive overwhelming support in recent articles (listed, *supra*, p. 11), all of which condemn the superficial brand of reasoning used below with regard to the Sixth Amendment. The recurring nature of the problem, and the emerging conflict in judicial opinion, suggest that this Court should undertake an authoritative review of the questions raised in this

Petition. See, e.g., *Thomas v. United States*, 386 U.S. 975 (Douglas, J., dissenting).

Petitioner invokes protection of the Sixth Amendment in contending that the Intelligence Division is an accusatory body and its investigations are an integral part of a "criminal prosecution" in which the accused taxpayer is entitled "to have the Assistance of Counsel for his defence." The Special Agent controls the prosecution from the moment he enters the case until final verdict and is an aide to the District Attorney. There is no valid reason why the same right to counsel which prevails inside and outside the courtroom after indictment. *Johnson v. Zerbst*, 304 U.S. 458; *Massiah v. United States*, 377 U.S. 201, at critical stages beforehand, *White v. Maryland*, 373 U.S. 59, and in the stationhouse after arrest, *Escobedo v. Illinois*, 378 U.S. 478, should not apply in the IRS conference room where one is "made the deluded instrument of his own conviction," *Watts v. Indiana*, 338 U.S. 49, 54, by a process so inherently deceitful that "he [does] not even know that he was under interrogation by a Government [law-enforcement] agent." *Massiah v. United States, supra*, 206. Although the element of formal custody may be lacking, surely that is not the only point at which "our adversary system begins to operate." Cf., *Escobedo v. United States, supra*, 492; *In re Groban*, 352 U.S. 330, 349-51 (Black, J., dissenting). The Court recognizes that a taxpayer may resist a Special Agent's formal demand for production of testimony and documents in "an adversary proceeding" on the ground "that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution * * *." *Reisman v. Caplin*, 375 U.S. 440, 445, 449. The adversary character is not altered by an informal demand which disguises the same improper purpose. When the prosecutorial

machinery of the Intelligence Division is directed against a taxpayer to elicit statements which will convict him, his need to be apprised of the purpose of the inquiry is as real and urgent as that of a suspect under custodial interrogation. *United States v. Turzynski, supra,* 854.

Yet the decision below holds "that a taxpayer's ignorance of the nature of an investigation by the IRS and of his legal right to resist 'is insufficient ground for suppression of evidence voluntarily given'" (App. A, *infra,* p. 36). It is specious to impute voluntariness to one who is guided by ignorance of his own situation, lacks legal advice, and is unaware of his right to resist. Voluntariness is necessarily grounded in knowledge. A taxpayer's disclosures to a Special Agent are "demanded under color of office" and "granted in submission to authority, rather than an understanding and intentional waiver of a constitutional right." *Johnson v. United States,* 333 U.S. 10, 13. The requirement of an *intelligent* as well as voluntary waiver is nullified when the Special Agent conceals his basic purpose, cf., *Gouled v. United States,* 255 U.S. 298; *United States v. Blalock,* 255 F. Supp. 268 (E.D. Pa. 1966), and — as a practical matter — leaves the taxpayer without "factual understanding of the proceedings against him." *Dusky v. United States,* 362 U.S. 402. This is absolutely repugnant to the Sixth Amendment.

> "The purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, and the guaranty would be nullified by a determination that an accused's failure to claim his rights removes the protection of the Constitution." *Johnson v. Zerbst,* 304 U.S. 458, 465.

4. *The issues presented in this Petition are the same or similar to those now pending before this Court in Mathis v. United States,* 376 F. 2d 595 (5th Cir. 1967), cert. granted,

88 S. Ct. 224 (No. 726, this Term). Here, as in *Mathis*, the basic issue is whether and to what extent the taxpayer is entitled to notice when the investigation shifts from a civil audit for possible deficiencies to a criminal investigation, when his assistance is not being sought to ascertain his just debt but to enable the Government to convict him of crime. Actually, the instant Petition would seem to provide a more substantial basis for granting review, since the Petitioner in *Mathis* was confronted only by Revenue Agents in the civil stage prior to transfer of the case to the Intelligence Division. Nor does *Mathis* involve a taxpayer ignorant of a pending criminal investigation; when a Special Agent did enter the case and sought an interview, he affirmatively advised the taxpayer and was refused any cooperation. It is true that the Petitioner in *Mathis* was incarcerated in a state penitentiary on unrelated state charges when the Revenue Agents talked to him. But it would be a tragic commentary on the paucity of a taxpayer's constitutional rights if he must be in jail before they accrue!

II.

The Invasion of Files Question

The radical departure from the adversary system, sanctioned below, calls for exercise of this Court's power of supervision. This case is perhaps without parallel in the annals of federal criminal justice. It is certainly without precedent. The prosecuting attorney has personally invaded the defense file, copied and examined Counsel's work product prepared for trial use, secured conviction with advance knowledge of the defense case, and then disclaimed on appeal any "wrongful intent" or prejudice to Petitioner. We submit that the decision below leaves a "chilling impact" on "a vital center in the administration of criminal justice, the lawyer's work in investigating and

preparing the defense of a criminal charge." *In re Terkeltoub*, 256 F. Supp. 683, 684 (S.D. N.Y. 1966). If "the Constitution recognizes an adversary system as the proper method of determining guilt," *Singer v. United States*, 380 U.S. 24, 26, this Court should keep that system in true balance by appropriate exercise of its power of supervision.

First, the decision below undermines the work-product policy of *Hickman v. Taylor*, 329 U.S. 495. Both courts below identified the material scrutinized by Osborn and the IRS agents as Counsel's work product, although part of it plainly fell within the attorney-client privilege.[2] In any event, we deal here with unjustified access to the internal memoranda of Counsel's theories, plans, and mental impressions, which

> "* * * falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted intrusions into the files and the mental impressions of an attorney." *Id*, 510.

Surely "the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure", *id*, 511, as to govern federal criminal prosecutions where the accused has no obligation to reveal any portion of his case, much less Counsel's work product. Even liberalized Rule 16(c), F.R.Cr.P., does not tolerate

---

[2] As to the defense net worth statement, two circuits hold: "This statement was prepared at the attorney's request, in the course of an attorney-client relationship, for the purpose of advising and defending his clients. The accountant's role was to facilitate an accurate and complete consultation between the client and the attorney about the former's financial picture. The lower court was correct in determining that these documents constituted confidential communications within the attorney-client privilege." *United States v. Judson*, 322 F. 2d 460, 462 (9th Cir. 1963). See also, *United States v. Kovel*, 296 F. 2d 918, 923 (2d Cir. 1961).

Government access to "internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case * * *." If a federal prosecutor openly sought disclosure of work product, the court would deny it to prevent irreparable harm:

> "The ultimate interest to be protected is the privacy and confidentiality of the lawyer's work in preparing the case. It is the violation of that interest that is held offensive to the Constitution in the cases of eavesdropping and spying. The protection would be a thin illusion if the Government could have for the asking what it has, in rare lapses, sought by less genteel means." *In re Terkeltoub, supra,* 685.

Second, the absence of protection below poses a substantial question under the Sixth Amendment as to Petitioner's right to a fair trial with effective representation. According to the District Court's unimpeached findings (App. C, *infra,* pp. 44, 46-47), the Government in one of its "rare lapses" acquired "wrongfully" and by stealth that which it could not have obtained by resort to accepted judicial procedures. Here, as in *Caldwell v. United States,* 205 F. 2d 879 (D.C. Cir. 1953), cert. denied, 349 U.S. 930, Petitioner was stripped of his right to effective assistance of counsel when, without restraint or prior notice, the prosecutor and his IRS colleagues methodically examined the entire file, including Counsel's work product. It was Osborn himself who admittedly decided what documents were to be copied. While this Court has never passed directly on the constitutional question, it strongly implied in *Hickman v. Taylor, supra,* 511, that such an outrage can only have disastrous impact on the adversary system in federal courts:

> "An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of

> legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served."

To remove from a lawyer the only tools which he can offer his client, especially in a complex tax prosecution in which Counsel must be resourceful to circumvent "those pitfalls inherent in the net worth method," *Holland v. United States,* 348 U.S. 121, 125, is to reduce any subsequent trial to the level of a farce. Attention is invited to the prophetic opinion of Judge Frederick van Pelt Bryan in *United States v. Simon,* 262 F. Supp. 64, 74-75 (S.D. N.Y. 1966), reversed on other grounds, 373 F. 2d 649 (2d Cir. 1967), cert. granted, *sub. nom. Simon v. Wharton,* 386 U.S. 1030, vacated as moot, 36 U.S.L.W. 3252 (12/18/67) (No. 72, this Term):

> "It would be wholly unrealistic to suppose that the prosecution in a criminal proceeding would not gain a very substantial advantage over the defendants if the nature of their defense and the evidence on which the defense was based were disclosed to the Government in advance of — and indeed here long in advance of — trial. Every experienced trial lawyer knows well the advantages the prosecution would be likely to gain under such circumstances.
>
> "With such material at its disposal a zealous prosecutor would be able to tailor his case to overcome anticipated defenses and avoid any possibility of surprise. If the defendants took the stand in their own defense, as [Petitioner did] in this case, there will already have been * * * a very material advantage to the prosecution in conducting its own cross-examination. The advantages gained to the prosecution might well be sufficient to tip the scales in favor of conviction particularly in a close case. Under the circumstances, the prosecution should not be permitted 'to obtain information * * * in a manner in which it [was]

> not entitled under the criminal rules.' This would circumvent the limitations provided by the criminal rules to ensure the fair administration of criminal justice from the standpoint both of the defense and prosecution." (Citations omitted).

Third, reliance below upon this Court's decisions in *United States v. Blue*, 384 U.S. 251, and *Hoffa v. United States*, 385 U.S. 293, is entirely misplaced. *Blue* held only that illegal acquisition of *evidence* does not bar the prosecution, not that the prosecution may delve into confidential files and try cases "on wits borrowed from the adversary." *Hickman v. Taylor, supra*, 516 (Jackson, J., concurring). Nor does *Hoffa* confer any such strategic advantage: (1) The claimed intrusion during Hoffa's Test Fleet trial did not bar later prosecution "on other and different charges." (2) The "clinching basic fact" in *Hoffa* was that the disclosures bore no relation to the charges on which he was ultimately tried and convicted. (3) There was no "exploitation" of a Sixth Amendment violation since the Test Fleet trial did not result in conviction. (4) Had such conviction materialized, it "would presumptively have been set aside as constitutionally defective." (5) Partin was an outsider to the attorney-client relationship and had no role in preparing the defense. (6) In contrast to *Massiah v. United States*, 377 U.S. 201, Hoffa was not under indictment on the charges of which he was ultimately convicted and this Court "put to one side the extraordinary problems that would have arisen if [he] had been arrested and charged during the progress of the Test Fleet trial." (7) This Court acknowledged its ability "to imagine a case in which the prosecution might so pervasively insinuate itself into the councils of the defense as to make a new trial on the same charges impermissible under the Sixth Amendment."

Fourth, much closer to the mark, but ignored by the court below, is *O'Brien v. United States,* 386 U.S. 345, wherein the FBI monitored a single conversation of an accused with his attorney concerning bail application. This Court summarily vacated and remanded for new trial, despite the Solicitor General's representation that the conversation "was not mentioned in any FBI report nor were its contents communicated to attorneys for the Department of Justice, *including those who prosecuted this case." Ibid* (italics added). See also, *Black v. United States,* 385 U.S. 26; *Roberts v. United States,* 88 S. Ct. 1 (No. 330, this Term).

Fifth, reliance below upon Osborn's belated disclaimer on appeal of any "wrongful intent" by the Government, is in plain disregard of the District Court's express findings. Judge Northrop, who heard the testimony of both Osborn and Gordon, was "unimpressed with the Government's apparent view that its actions were entirely proper", stated "that had the facts made known at these hearings been presented after conviction instead of before trial, the Court would have granted a new trial", and held Osborn accountable for "the Government's wrongful conduct" and the "wrongful taking of the documents" (App. C, *infra,* pp. 46-47, 49).[3] It is astonishing that the court below would ignore these findings and reach an opposite conclusion on Osborn's say-so. His unsworn disclaimer in oral argument, on behalf of himself and the IRS agents, derives no colorable support from the record. Since the truth had to be pried out of the participants, whose unsupervised acts were cloaked in secrecy, saddling Petitioner with the burden of proving "wrongful intent" is as unrealistic as it is unfair that his road to prison should be paved with Osborn's retrospective good intentions.

---

[3] Earlier in the hearing Judge Northrop remarked "that the action that the Government took was certainly reprehensible in this case."

Moreover, the attempted distinction between "wrongful intent" and "an extreme, even stupid, error of judgment" is much too thin to satisfy the Sixth Amendment or repair erosion to the adversary system. "There is no place in our system of criminal justice for prosecutorial misconduct." *Nash v. Illinois*, 88 S. Ct. 222, 223 (No. 163, Misc., this Term) (Fortas, J., dissenting). This Court is "not limited in our review of constitutional errors in state criminal proceedings to those errors which flow from 'prosecutorial bad faith or intentional misconduct.'" *Burgett v. Texas*, 88 S. Ct. 258, 262-3 (No. 53, this Term) (Warren, C.J., concurring). Nor does vindication of rights in federal proceedings depend upon affirmative proof of prosecutorial "wrongful intent".

> "We recognize that the prosecutor in this case was faced with a real dilemma * * *. We do not question that he then acted with what must have seemed high motives, and certainly with active diligence. But high motives and zeal for law enforcement cannot justify spying upon and intrusion into the relationship between a person accused of crime and his counsel." *Caldwell v. United States, supra*, 205 F. 2d at 879.

Sixth, the "substantial prejudice" test applied below is in conflict with *Glasser v. United States*, 315 U.S. 60, 75-76, in which this Court held:

> "To determine the precise degree of prejudice sustained * * * is at once difficult and unnecessary. The right to have the ['untrammeled and unimpaired'] assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

When each of the main participants in a federal prosecution admit to having studied defense counsel's work product, it is submitted that the ensuing trial is inherently saturated with prejudice, "substantial" or otherwise. The

contrary holding below clashes with the decisions of every circuit to pass on an analogous situation. *Coplon v. United States,* 191 F. 2d 749, 759 (D.C. Cir. 1951), cert. denied, 342 U.S. 926; *United States v. Lebron,* 222 F. 2d 531, 534 (2d Cir. 1953), cert. denied, 350 U.S. 876; *United States v. Venuto,* 182 F. 2d 519, 522 (3rd Cir. 1950).

Seventh, the "remedial action" below was wholly ineffectual under the circumstances. This is obviously not a case like *United States v. Blue,* 384 U.S. 251, in which suppression wipes the slate clean. Here, as in *Caldwell v. United States, supra,* 205 F. 2d at 881, "the surreptitious effort was not designed to get evidence", but was designed to acquire knowledge of Counsel's mental impressions, legal theories, and strategems. The prosecution went to trial with full knowledge of its adversary's case — strong points and weaknesses, contemplated proof at trial, and Counsel's plans to meet the Government's case. An order suppressing tangible evidence is singularly inappropriate where the matter to be suppressed does not remotely qualify as evidence. Rule 41(e), F.R. Cr. P., "is calculated to prevent, not to repair." *Elkins v. United States,* 364 U.S. 206, 217. By its own terms, the Rule is designed only "to suppress as evidence" but does not purport to reach the irreparable situation where the trial strategy and defense preparations of Counsel have been laid bare to the prosecutor and his chief witnesses. *United States v. Simon, supra,* 262 F. Supp. at 76-77. Even when it is merely a question of tainted evidence, *Silverthorne Lumber Co. v. United States,* 251 U.S. 385, 392, admonishes that "the essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that *it shall not be used at all.*" *Silverthorne* outlaws not only the tangible fruits, but rejects the notion adopted below that the prosecution "may study

the papers before it returns them, copy them, and *then may use knowledge that it has gained*" to try the case and secure conviction. *Ibid* (italics added). Unlike *Silverthorne*, wherein documents seized by a U. S. Attorney were immediately court-impounded, Osborn examined the file in depth, studied the papers several weeks before being ordered to return them, investigated leads, and admittedly used information to resolve inconsistencies in his own net worth analysis. Suppression of material copied was a token price to pay for his advance knowledge and ill-gained insights into the defense camp. In the pre-trial hearing Osborn so informed the court:

> "Here we may have gotten some free discovery. We did get some free discovery. I have already promised not to use what we did obtain. Of course, we have the free discovery and can't dissipate that from our minds."

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted, that the argument in *Mathis v. United States* (No. 726, this Term) should be postponed, and that the two cases should be set for argument consecutively.

NORMAN P. RAMSEY,
THOMAS WAXTER, JR.,
H. THOMAS HOWELL,
Attorneys for Petitioner.